

**BOARD OF FIRE AND POLICE COMMISSIONERS
OF THE CITY OF MILWAUKEE**

In the Matter of the Appeal of Michael J. Dunn

Hearing Dates: June 20, 2016

Hearing Location: Room 301-A, City Hall, 200 E. Wells Street

Commissioners: Steven M. DeVougas
Kathryn A. Hein
Ann Wilson

Hearing Examiner: Rudolph M. Konrad

Appearances: For the Milwaukee Fire Department,
Assistant City Attorney Robin A. Pederson

For Michael J. Dunn
Attorney William R. Rettko

PROCEDURAL HISTORY

Fire Chief Mark Rohlfing ordered that Heavy Equipment Operator Michael J. Dunn be discharged from the Milwaukee Fire Department effective October 14, 2014. The First Amended Complaint (Exhibit 1) alleges he violated the following rules and regulations:

- 24.1 Rules, Orders, Laws, Ordinances, etc.
- 24.2 General Conduct
- 27.2 Violations of Numbered Notice #2006-06: Commitment to Professional Conduct and Behavior

Dunn, the Appellate in this matter, filed an appeal with the Milwaukee Fire and Police Commission from the order of the Fire Chief and a hearing was held.

SUMMARY OF HEARING PROCEEDINGS

The hearing was held on June 20, 2016. The hearing was recorded by a stenographic reporter. Testimony was taken from the following witnesses:

For the Fire Chief: Fire Chief Mark Rohlfing
For the Appellant: Fire Captain Steven Behnke
Michael J. Dunn

STANDARD OF PROOF

This appeal is governed by the seven “just cause” standards set forth in Wis. Stat. sec. 62.50(17)(b). The Commission must find by a preponderance of the evidence that there is just cause to sustain the charges. Preponderance of the evidence means “more likely than not,” rather than just possible. See, e.g., *U.S. v. Johnson*, 342 F.3d 731, 734 (7th Cir. 2003). Disciplinary appeals before this Board are divided into two parts. In Phase I, we determine whether a violation of a Department rule has been proven by a preponderance of the evidence. In making this determination, we are guided by the first five “just cause” standards set forth in Wis. Stat. §62.50(17)(b). In Phase II, we determine whether the “good of the service” requires discharge or some lesser discipline. In making this determination, we are guided by the sixth and seventh statutory “just cause” standards.

Based upon the evidence received at the hearing, the Commission makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. At the Phase I hearing, Michael Dunn did not contest the charges in the complaint nor whether the Fire Chief, in his investigation and imposition of discipline, satisfied the five “just cause” standards stated in Wis. Stat. sec. 62.50(17)(b). Accordingly, we find that the charges and the first five “just cause” standards have been established.
2. In order to establish on the record the factual basis for the Chief’s discharge of Dunn, Exhibits 1 through 5 were admitted into evidence.
3. Exhibit 1 is the First Amended Complaint. The specification in the First Amended Complaint summarizes his offense as follows:

“On August 16, 2014, in the evening, Heavy Equipment Operator Michael J. Dunn was arrested at his residence ... by members of the Milwaukee Police Department, for disorderly conduct and domestic abuse.

“Separate from the arrest, the Milwaukee Fire Department conducted a full investigation as to the behavior and conduct of Heavy Equipment Operator Dunn, including a Board of Investigation on October 2, 2014, and determined that he had engaged in violent and abusive conduct toward his wife, and in front of his underage daughter.

“Heavy Equipment Operator Dunn was found guilty of disorderly conduct with a charge modification of domestic abuse on November 17, 2015 by the State of Wisconsin.” (Ex. 1).

4. Exhibit 2A is a Matter Of dated September 29, 2014, in which Dunn tells Battalion Chief James H. Ley his version of the events that led to his arrest.
5. Exhibit 3 is a certified copy of a State of Wisconsin Criminal Complaint filed against Dunn on April 5, 2014, entitled *State of Wisconsin v. Michael James Dunn*. The complaint states the alleged conduct of Dunn against his wife on August 16, 2014, if proven, would support a conviction of Disorderly Conduct, Domestic Abuse, a Class B Misdemeanor.
6. Exhibit 4 is a certified copy of a State of Wisconsin Judgment of Conviction in the case of *State of Wisconsin v. Michael James Dunn*, entered on November 17, 2015. The Judgment convicts Dunn of violating Wis. Stat. sec. 968.075(1)(a), Disorderly Conduct, Domestic Abuse, a Class B Misdemeanor.
7. Exhibit 5 is a certified copy of the court record in *State of Wisconsin v. Michael James Dunn*. The record notes that on November 17, 2015, Dunn pled no contest to the charges and stipulated to the complaint as a factual basis to sustain the plea.
8. Based upon (1) Dunn's failure to contest the charges in the First Amended Complaint, (2) his conviction of the charge of Disorderly Conduct, Domestic Abuse, and (3) his stipulation to the facts stated in the criminal complaint as the factual basis to sustain his plea, the Commission finds that the facts stated in the First Amended Complaint and the criminal complaint are established.

CONCLUSIONS OF LAW

9. In Phase I, we determine that the first five "just cause" standards set forth in Wis. Stat. §62.50(17)(b) have been met.
10. In Phase II, we determine whether the "good of the service" requires discharge or some lesser discipline. In making that determination we are guided by the sixth and seventh statutory "just cause" standards. We also take into account the categories of evidence specified in Section 14 of our own Rule XVI (i.e., evidence regarding "character, work record, and the impact of the misconduct on the complainant, department, and community"). In this appeal, Dunn has waived Phase I and concedes that he violated department rules, and that the Fire Chief has satisfied the first five "just cause" standards. Therefore, we will confine our analysis to the Phase II issues and evidence. We will first address the seventh "just cause" standard and then the sixth standard.
11. The seventh "just cause" standard is, "Whether the proposed discipline reasonably relates to the seriousness of the alleged violation and to the subordinate's record of service with the chief's department." The Fire Chief explained to the Commission his reasons for discharging Dunn. First, he found that Dunn's conduct (which resulted in his arrest and conviction for disorderly conduct, domestic abuse, as described in Exhibit 3), was particularly violent both physically and verbally. Second, prior to the arrest for domestic

abuse, Dunn had exhibited a pattern of threatening behavior, as summarized in Exhibit 6, to wit:

- In 2004, he was disciplined for shouting obscenities at a superior officer who merely had enforced a department policy.
- In 2009, he was arrested for placing a foreign substance, the drug Lexapro, in his wife's drink, which was also ingested by his son. For this conduct he was convicted of a municipal ordinance violation and disciplined.
- In 2014, he made a threat against another department member thereby creating a hostile work environment, for which he was disciplined.

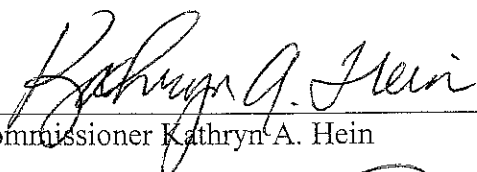
Dunn exhibited this pattern of behavior in spite of participating in the Employee Assistance Program. The Chief gave no weight to the fact that some of Dunn's conduct occurred off duty because the Department rules apply on and off duty.

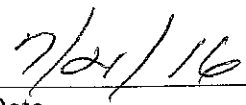
12. Dunn was appointed Firefighter on March 4, 1991, and promoted to Heavy Equipment Operator on March 19, 2000. (Ex. 6). In his defense, Dunn testified about the positive contributions he had made to the department during his years of service and introduced documents attesting to those actions. (Ex. 13). We find, however, in light of the seriousness of the charges and his pattern of behavior, his positive service is not sufficient to warrant a discipline less than discharge. We conclude the Chief has satisfied the seventh standard by a preponderance of the evidence.
13. The sixth "just cause" standard is, "Whether the chief is applying the rule or order fairly and without discrimination against the subordinate." The Fire Chief testified he could not find any comparable disciplinary action. A class B misdemeanor conviction alone does not result in discharge in all cases. Whether it results in discharge depends on the facts and the member's department record. Dunn's conduct consisted of violent domestic abuse coupled with a threat to another department member eight months earlier. Moreover, his disciplinary record showed a pattern of threatening behavior.
14. The Commission finds Dunn's attempts to show that other department members engaged in similar conduct and were not discharged is unconvincing. Exhibit 7 indicates a member (Callies), was convicted in September, 1999 of a class B misdemeanor. Chief Rohlfing was appointed Fire Chief on March 3, 2010, and had not been a member of the department before that date. Accordingly, he was unfamiliar with the facts of that case. Nevertheless, the conduct at issue was serious, use of a telephone to threaten harm. In that case the member had made a bomb threat. In rejecting this as comparable we note the record is devoid of any information showing the individual in question had engaged in or exhibited a pattern of threatening behavior prior to the 1999 conviction; in other words, there is no record of a pattern of threatening behavior similar to Dunn's record. Moreover, a bomb threat made today would be taken more seriously than it might have been in 1999, before the escalation in terror-related violence which occurred after September 11, 2001.

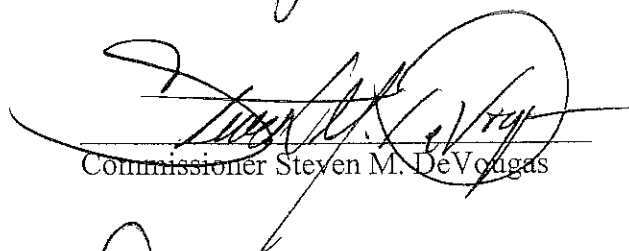
15. Exhibit 9 indicates a member (Gross), was convicted in January 2008, of Operating While under Influence (2nd), an unclassified misdemeanor. In addition, in July, 2010, a restraining order was issued against the member. Members of the Department are obligated to self-report police contact to the Department. In this case, it was not established that the member had reported the case to the Department. Moreover, the conviction also occurred before Rohlfing was appointed chief and was for a criminal traffic offense and not for domestic abuse. It has not been established that there was a pattern of offenses for the earlier chief to have considered.
16. Exhibit 10 indicates a member (Hegeman), was convicted in April 2011, of Operating While under Influence (2nd), an unclassified misdemeanor. This conviction was also for a criminal traffic offense and it was not established that the member had exhibited a pattern of offenses. Chief Rohlfing did discipline (but not discharge) the member for the offense. The Chief imposes discipline in OWI cases according to a matrix based upon whether it is the first, second, or third offense and allowing extenuating circumstances to be taken in consideration by way of the Milwaukee Fire Department's Code of Conduct. The Chief disciplined the member in accordance with the matrix.
17. Exhibit 11 indicates a member (Leonard), was convicted in August 2008, of Endangering Safety/Use/Dangerous Weapon, a class A misdemeanor. It was not established that the member had reported this incident to the Department. Moreover, this conviction also occurred before Rohlfing was appointed chief and it was not established that the member had exhibited a pattern of offenses for the earlier chief to have considered.
18. Exhibit 12 (Monaghan), indicates a member was convicted in December 2011, of a civil disorderly conduct. In the course of that case a "no contact" order was issued. Moreover, it was not established that the member had reported this incident to the Department. The Chief heard about the case sometime later, but does not recall if discipline was imposed. This case does not involve a criminal conviction and no evidence of a pattern of offences was introduced.
19. Accordingly, we conclude the Chief has satisfied the sixth standard by a preponderance of the evidence. We further conclude that the good of the service requires that Michael J. Dunn be discharged from the Milwaukee Fire Department for the charges sustained.

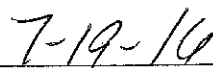
DECISION

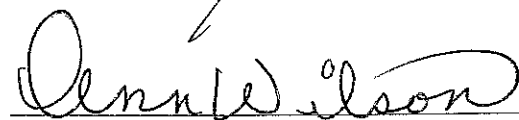
The Appellant, Michael J. Dunn, is ordered discharged from the Milwaukee Fire Department.

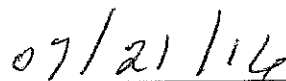

Commissioner Kathryn A. Hein


Date


Commissioner Steven M. DeVogus


Date


Commissioner Ann Wilson


Date